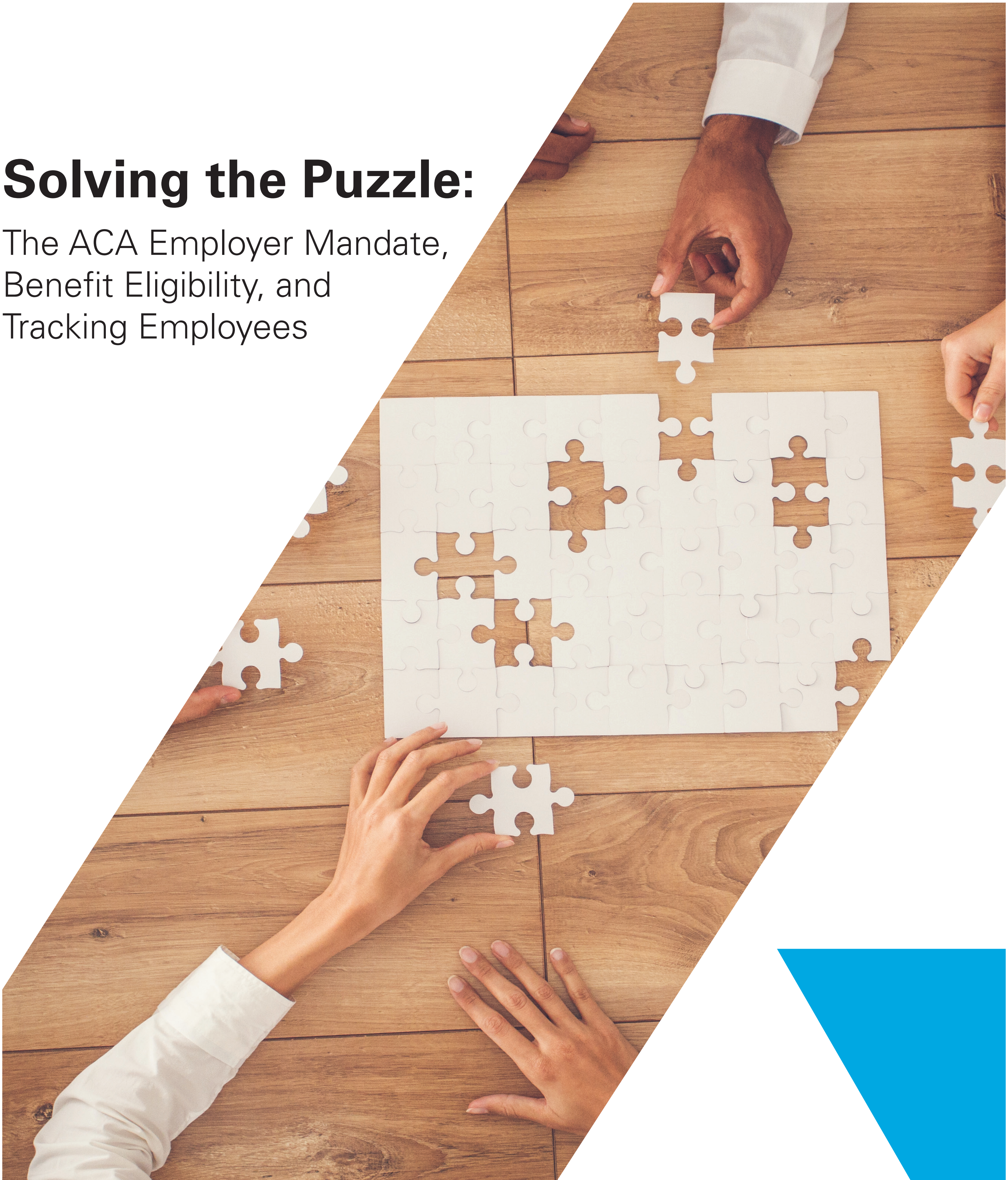
# Solving the Puzzle:

## The ACA Employer Mandate, Benefit Eligibility, and Tracking Employees



Prior to the passage of the Patient Protection and Affordable Care Act (ACA), most employers based benefit eligibility on a straight–forward basis. Once an employee no longer worked the requisite number of hours for benefit eligibility (often set at 40 hours a week prior to the ACA), they were dropped from the plan. When the ACA employer mandate (or pay or play) began in January 2015, the pay or play requirements set a threshold that applicable large employers (ALEs, determined on a controlled group basis) offer affordable, minimum value, minimum essential coverage to all ACA full–time employees and their dependents or face a potential penalty.

**Remember:** The Internal Revenue Service's (IRS) controlled group rules apply. All employees across a controlled group count. This means that a small employer is subject to the employer mandate if it is a member of an ALE, thus, an "ALE Member." Controlled group analysis can only be performed by an employer's tax advisor or experienced legal counsel.

Under the employer mandate, an employee is full–time if they average 30 hours of service per week for a calendar month or at least 130 hours per month. The play or pay final regulations require that employers use one of two method to track hours and determine status as full–time or part times: the monthly measurement method or the look–back measurement method. Both methods have complexities and nuances, and employers have many questions about what hours must be counted, who must be tracked and how, the impact on other benefits, how breaks in service are handled, and more. This paper is intended to address those questions, provide some examples, and recommend best practices.

## Do we have to track every employee?

**Yes. It is critical that ALEs use one or both of the two measurement methods, tracking all employees within the parameters of the regulations, so that they may guard against employer mandate penalties.** Regardless of the workforce composition, it is important to apply the measurement method selected uniformly across all employees. Failure to do can lead to costly problems down the road, as ALEs must report to the IRS annually about the coverage offered and to whom.

**Remember:** There are two different sets of penalties: (1) failure to file and furnish returns for full–time employees and (2) failure to offer affordable, MV coverage to ACA full–time employees and their dependents. Failure to track properly will cause reporting inaccuracies and expose employers to costly penalties. These penalties, in some instances, are multiplied by all full–time employees and can reach seven figures.


## What hours must be tracked?

"Hours of service" must be counted using one of the measurement methods for determining whether an employee is an ACA full–time employee.

| Under the ACA, any hour for which an employee is paid or entitled to payment must be counted as an hour of service. This includes: | Exceptions to the rule exist for: |
|---|---|
| • An hour worked<br>• Vacation Holiday<br>• Sick time<br>• Incapacity (including disability)<br>• Layoff<br>• Military duty<br>• Paid leave<br>• Jury duty | • Hours worked by a student as part of the Federal Work–Study Program (or a similar state or local program)<br>• Hours which are considered income from sources outside the United States<br>• Hours performed as a "bona fide volunteer" |

For hourly employees, an employer must count actual hours worked or paid. For employees who are not paid hourly, an employer must use any of these three methods:

1. Actual hours paid – Counting actual hours of service for payment is due (regardless of whether it is for work, vacation, jury duty, etc.);
2. Days–worked equivalency – Crediting an employee with eight hours of service for each day for which the person was entitled to pay for at least one hour; or
3. Weeks–worked equivalency – Crediting an employee with 40 hours of service for each week for which the person was entitled to pay for at least one hour.

Employers must be mindful not to use a crediting system that would short an employee's hours. For example, employees that work 10–hour shifts three days a week could not have the days–worked equivalency, as those hours would be undercounted.

## If an employee measures full–time, do we have to offer that employee all our benefits?

**No. Employers are not required to base eligibility for the medical plan on whether the employee measured as an ACA full–time employee under the tracking method.** However, it is strongly recommended that they do so to ensure they are offering medical coverage to all ACA full–time employees. Moreover, employers are not required to use the ACA method of calculating full–time employees for other benefit eligibility, such as dental and vision—but it has become a consideration. Using the same method for all benefits reduces the likelihood of confusion and administrative error when employers have uniform eligibility requirements for medical, dental, and vision, and it eliminates the need for multiple tracking methods or systems. Using separate methods can lead to different benefit outcomes during leaves of absence and other reductions of hours.

Employers must communicate the method of calculating eligibility to employees in plan documents, open enrollment materials, handbooks, and the like where benefit eligibility is discussed.

## Monthly Measurement Method

Under the monthly measurement method, the employer looks at each employee's actual hours of service each calendar month. An employee is assumed to be full–time for the month if he or she has 130 hours of service (regardless of the actual length of the month).

**Monthly Measurement Method & FMLA:** If an employee takes paid FMLA leave, the paid hours will count in the monthly total of hours. If the employee takes unpaid FMLA leave (or any other unpaid leave) the employee would not have any hours credited to them during their leave. Benefits are always protected during FMLA leave though, regardless of whether it is paid or unpaid.

If a formerly full–time employee returns from a leave of absence within 13 weeks (26 weeks for employers that are educational institutions of any type), coverage must resume by the first of the month on or following the date of return (assuming the employee was and is now full time). This would include if the employee quit their job or was terminated but is then re–hired (even if they were re–hired in a different position).

**Can I Measure Different Groups of Employees Differently?**

Maybe. An ALE Member cannot apply both measurement methods to the same category of employees. In this context, there are only four permissible categories.

1. Collectively bargained and non–collectively bargained (union)
2. Covered under different collective bargaining agreements (unions)
3. Hourly and salaried
4. Employees located in different states

ALE Members may apply the measurement methods differently between members in a controlled or affiliated service group. Be aware that different measurement and stability periods could cause problems on non–discrimination testing under the tax code.

The monthly measurement method allows employers to respond quickly to an employee's reduction of hours. If an employee moves from full–time to part–time status, the employer does not need to offer affordable coverage once the employee drops below 130 hours for the month. (COBRA would be triggered, but an employer would not be penalized for it being "unaffordable" because the employee is not an ACA full–time employee for that month.) Conversely, this method requires employers to respond quickly if an employee's hours are increased to measure 30 hours of service per week or 130 hours of service per month. If an employee moves from part–time to full–time, the employer will need to offer coverage by the first of the fourth month as an ACA full–time employee in order to avoid ACA penalties.

**Interns and seasonal, temporary, and part-time employees:** Under the ACA's monthly measurement method, these individuals are treated the same. If a seasonal, temporary, or part-time employee or intern averages 30 hours of service a month or more and satisfied the waiting period (which can be no longer than 90 days to avoid penalties), affordable coverage must begin no later than the first day of the fourth month following hire. Both the 90-day waiting period rule AND the first day of the fourth month rule must be met, as they are not identical.

**Example:** Phoebe works 20 hours a week for Massage House from January 1, 2021, through December 31, 2021. Phoebe is not eligible for, and is not offered, coverage in 2021. On January 1, 2022, Phoebe is promoted to a full-time supervisor position and is eligible for coverage after completing 90 days as a supervisor. As of April 1, 2022, Massage House offers affordable, minimum value coverage to Phoebe. Massage House has met its obligations.

## Confirm then Verify

The monthly measurement method is the default method if a measurement method is not formally selected. Employers should formally document that they use the monthly measurement method, and verify this with their payroll, time keeping, and ACA reporting systems.

Employers who select the monthly measurement method for eligibility purposes should notify employees of this method wherever they discuss eligibility (plan documents, benefit enrollment materials, etc.) and should work to promptly move employees off the plan (and offer COBRA as applicable) when their hours drop below the requisite 130 for the month. Employers using the monthly method do not have any methods they can use to delay offering full time employees coverage after hire. Employers with a workforce that experiences constant changes in hours (common examples include shift workers, on-call employees, hospitality industry, substitute teachers, healthcare settings, home-health care or other therapy providers) should be prepared for significant movement on and off the plan if they use the monthly method.

## Look–back Measurement Method

Under the look-back method, the employer looks at how many hours the employee averaged during a look–back period called a "measurement period." Once the employer determines whether the employee worked full-time during the measurement period, that determination generally will apply throughout the related stability period regardless of how many hours the employee actually works (unless the employee's employment ends). Under the look-back period method, employees are categorized as ongoing employees, and new employees. New employees will have their own process until they become an existing, or ongoing employee. An employee is considered "ongoing" once he or she has completed a full standard measurement period.

For ongoing employees, the employer looks at how many hours the employee averaged during a look–back period called a "standard measurement period." The standard measurement period is the same period on the calendar for all ongoing employees, hence the term "standard measurement period". Once the employer determines whether the employee worked full–time during the standard measurement period, that determination will apply throughout the related stability period regardless of how many hours the employee actually works (unless the employee's employment ends, or the employee moves to a part–time position and other strict conditions are met).

The employer must choose a "standard measurement period" of three to 12 months. The standard measurement period is the "look–back" period that is used to track the employee's hours and determine how many hours the employee worked, on average, during the standard measurement period.

The employer must choose a start date for the standard measurement period. It can be any day of the year, although the start of the benefit year is the most commonly used (January 1st for calendar year plans).

The employer must choose a stability period. The stability period is the period for which the employee is considered "full–time" or "not full–time," based on the average hours worked during the standard measurement period, regardless of an employees hours during the stability period itself.

| Stability Period Requirements for Ongoing Employees |
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| 1. The stability period must be at least as long as the standard measurement period |
| 2. The stability period cannot be longer than 12 months |
| 3. The stability period must be no longer than the standard measurement period if the employee is determined to not be full time |
| 4. The stability period must be least six months if the employee is determined to be full-time |
| 5. The stability period must immediately follow the standard measurement period and any related administrative period (administrative periods cannot create gaps in coverage). |

Although the rules would permit a measurement period of less than six months, stability period requirements three and four make that administration very cumbersome. Therefore, it is not recommended to have a measurement or stability period that is shorter than 6 months. If an employer has a measurement or stability period that is shorter than 12 months, they will need to recognize they will end up holding a second open–enrollment annually as a result. Therefore, for most employers it is easiest to have a 12–month measurement and stability period, with the stability period matching the plan year.

## Administrative Periods

The administrative period is simply the time at the end of a measurement period, before the stability period begins, and is typically when open enrollment is held. This period overlaps the next measurement period and gives an employer an opportunity to look at the results of the measurement and determine who is being offered coverage during open enrollment and who will no longer be eligible. The administrative period cannot be longer than 90 days and does not add or remove time from the measurement period or stability periods.

**Example**

The Sandwich Shop has 75 employees. They have a calendar year plan and traditionally hold open enrollment in early December. Below is a visual example of their set up:

1. Stability period of 12 months, January 1 to December 31.
2. Measurement period of 12 months, from October 15 of one year to October 14 of the next year.
3. Administrative period that begins October 15 through December 31
4. Open enrollment that begins the first Monday in December
5. New plan year begins on January 1, in line with the new stability period.

On October 17, 2022, Joey who is an employee of the sandwich shop is in his stability period for the 2022 year (based on hours worked in 2020 and 2021), his employer is utilizing their administrative period, and his open enrollment will begin in early December for the next plan year. He is also being measured for the 2024 plan year at this time.

| Jan 2022 | Feb | March | April | May | June | July | Aug | Sep | Oct | Nov | Dec 2022 | Jan 2023 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Stability Period for 2022 Plan Year | | | | | | | | | | | | |
| Standard Measurement Period that Began October 15, 2021, continues until October 14, 2022 | | | | | | | | | Admin Period (77 days) | | | |
| | | | | | | | | | Standard Measurement Period Begins October 15, 2022, ends October 14, 2023. | | | |
| | | | | | | | | | | | Open Enrollment for 2023 | |
| | | | | | | | | | | | | 2023 Plan Year Begins |
| | | | | | | | | | | | | Stability Period for 2023 Begins |

## New Hires & The Measurement and Look-Back Method

New employees of an ALE using the measurement and lookback method fall into three categories:

- Reasonably expected to work full time
- Part-Time
- Variable Hour, or Seasonal

A new employee who is reasonably expected to work 30 or more hours per week must be offered coverage with an effective date that is not later than the first of the month on or following completion of three calendar months of employment. In addition to the first of the fourth month rule, separate rules require that the waiting period can be no longer than 90 days. Both rules must be satisfied.

If minimum value, minimal essential, affordable coverage is offered by the end of the three-month period, no penalty will be owed during the first three calendar months of employment. If the employer does not offer acceptable coverage by the end of the third full calendar month to an employee who is reasonably expected to work 30 or more hours per week, the penalty will be due from the employee's start date.

The monthly measurement period method will be used for the new, full-time employee until the employee has completed a full standard measurement period. This can take almost two years depending on the employer's standard measurement period and when the employee starts.

**Example**

The Sandwich Shop has 75 employees. They have a calendar year plan and traditionally hold open enrollment in early December.

- Stability period of 12 months, January 1 to December 31.
- Measurement period of 12 months, from October 15 of one year to October 14 of the next year.
- Administrative period that begins October 15 through December 31.

On February 10th, 2021, Joey is hired as a FT employee of The Sandwich Shop, averaging 35-45 hours a week. He is offered coverage beginning April 1st but chooses not to enroll at this time.

Beginning March 1 of 2021, Joey is measured under the monthly method. On October 15th, Joey's hours are also tracked under the look-back measurement method.

Joey has continued to average full time hours, so, when open enrollment is offered in December of 2021, Joey is offered coverage and decides to enroll. In January of 2022, Joey is enrolled on the plan. Joey is still being measured under the monthly method, as well as the look-back measurement method. If for some reason Joey's hours slipped below 30 hours a week, Joey would be offered COBRA, while continuing to be measured under both systems. Similarly, if after the slip his hours went back up, he'd be offered coverage again until he became an ongoing employee and his eligibility was dictated by the measurement period.

On October 14, 2022, 20 months after being hired, Joey becomes **an ongoing employee.** If Joey averaged full time hours during the measurement period, Joey would be offered an opportunity to enroll at open enrollment for 2023. If Joey did not average full time hours, Joey would have remained on the plan until the month after he was no longer eligible under the monthly method. In most cases Joey would have been offered COBRA at that time.

## Part Time New Hires

A new employee who is not expected to work 30 hours a week or more does not have to be offered coverage at the time of hire but should be measured under the monthly method until they complete the first full standard measurement period, and then measured under every measurement period thereafter. If the employee ever averages full time hours under the monthly method or during a measurement period, they should be offered coverage accordingly.

| FMLA, Jury Duty, and USERRA Leave During Stability Periods | Other Unpaid Leave (Except Unpaid FMLA) |
|---|---|
| If an employee is on a leave of absence under FMLA (paid or unpaid), Uniformed Services Employment and Reemployment Rights Act (USERRA), or jury duty, under the look-back method the employee is treated as if he or she worked during the leave, even if the leave is longer than 501 hours. This means employees are offered coverage while they are on leave, and when their hours are calculated during the leave period's contemporaneous measurement period, the period of leave is disregarded. Employees are essentially treated as if they worked the entire time during the leave. | If the employee is on an unpaid leave of absence (except unpaid FMLA) and in a stability period, the employee must be offered coverage through the stability period.<br><br>When the employee's hours are calculated during the current measurement period, the leave of absence will count as zero hours of service. |

## Variable Hour and Seasonal New Hires

Employers who hire variable-hour or seasonal employees may elect to use an "initial measurement period" to determine whether the employee is full-time during a subsequent stability period. This gives the employer time to see how an employee's hours average out before having to determine if they should be offered coverage.

Employers that use this method do not have to pay a penalty for failing to offer coverage right away, even if the employee is determined to be full time. This method may only be used when the employer truly expects the employee's hours to fluctuate, or the employee is a seasonal employee.

A "variable-hour employee" is defined as an employee who, as of their start date, is in a position for which the employer cannot reasonably anticipate whether the employee's average hours will be above or below an average of 30 hours per week. An individual who is hired to work full time hours for a short period of time is not a variable hour employee. A "seasonal employee" is an employee who is hired for a position for which the customary annual employment is six months or less. Typically, the period for which work is available is about the same time each year. Interns should not be automatically categorized as seasonal employees.

**Is this available to me?**

To use this method for variable hour and seasonal new hires, an ALE must use measurement and stability periods with its ongoing hourly employees, or with employees in the bargaining unit. An employer may not use the look-back method only with variable-hour and seasonal employees while using the monthly method for other employee populations.

Common examples of seasonal employees are ski instructors, snowplow drivers, landscapers, holiday hour retail employees, agricultural workers, camp counselors, lifeguards, and tax preparers.

**To use the seasonal/variable-hour look-back option:**

- An "initial measurement period" of three to 12 months must be chosen
- The stability period must be the same length as the stability period for ongoing employees

  – For new employees determined to be full-time, it must:
    - be at least as long as the initial measurement period
    - be at least six months long

  – For new employees determined not to be full-time, it must not:
    - be more than one month longer than the initial measurement period
    - exceed the remainder of the standard measurement period, plus any associated administrative period, in which the initial measurement period ends

For variable hour and seasonal employees, the administrative period cannot be more than 90 days, and the combined administrative period and initial measurement period cannot be longer than the last day of the first calendar month beginning on or after the first anniversary of the employee's start date— a long way of saying the calculation period cannot be more than 13 months plus a fraction of a month.

The initial measurement period time frame is selected by the employer, however that initial measurement period begins on each individual variable hour or seasonal employee's date of hire. To assist with administration, employers with large numbers of variable hour or seasonal employees should consider starting all new hires on the same 1-2 days of the month, such as the first and the fifteenth of the month. This way all the new hires are grouped together and their initial measurement periods can all start and end at the same time.

Employees do not stay variable hour or seasonal indefinitely, even if their job continues to have fluctuating hours. Employees will eventually transition into being ongoing employees, who will at the end of each measurement period, be either full time or part time.

**Consideration:**

If an employer has individuals who have worked for them for multiple years and are being called "variable hour" employees, this is a red flag and the employer's measurement and tracking practices should be reviewed.

If an employee is hired and placed into an initial measurement period because their position is variable hour or seasonal, and the employee terminates employment prior to completing their initial measurement period, employers should note that the individual will not receive an 1095-C form, as they were never considered a full time employee (they left prior to the determination being made). Similarly, if an employee is hired for a seasonal position and leaves prior to completing the initial measurement period and is later rehired (perhaps for the same seasonal work) after a break of more than 13 weeks (26 for educational employers), they would start a new initial measurement period.

Transitioning a new variable-hour or seasonal employee requires testing in both the initial measurement and subsequent standard measurement periods. If an employee is determined to be full-time in either period, he or she must be offered coverage for the full applicable stability period.

**Example**

The Sandwich Shop has 75 employees. They have a calendar year plan and traditionally hold open enrollment in early December.

- Stability period of 12 months, January 1 to December 31.
- Measurement period of 12 months, from October 15 of one year to October 14 of the next year.
- Administrative period that begins October 15 through December 31

The Sandwich Shop has set up a 12-month measurement period for variable hour new hires.

On February 10th, 2021, Joey is hired as an employee of The Sandwich Shop, but in his position, he can work anywhere between 15 and 45 hours a week. The Sandwich Shop is not sure if Joey will be full time or not. Instead of deciding on Joey's benefits right away, Joey begins an initial 12-month measurement period on February 10th. Then beginning on October 15th, Joey's hours are also tracked under The Sandwich Shop's standard measurement period.

On February 11th, 2022, Joey's hours are tabulated, and it was determined he averaged 28 hours a week for the first 12 months. He is not offered coverage and he moves from being a variable hour employee to a part time employee. In October, at the end of the standard measurement period, Joey's hours are calculated again, as he is now an ongoing employee. This time he averages 31 hours a week and will move from being part time to full time, and he will be offered coverage during open enrollment in December, to start coverage on January 1, 2023. Going forward Joey's hours will be reviewed at the end of every standard measurement period.

On February 10th, 2021, Ross is hired as an employee of The Sandwich Shop, but in his position, he can work anywhere between 15 and 45 hours a week. The Sandwich Shop is not sure if Ross will be full time or not. Instead of deciding on Ross' benefits right away, Ross begins an initial 12-month measurement period on February 10th. Then beginning on October 15th, Ross' hours are also tracked under The Sandwich Shop's standard measurement period.

On February 11th, 2022, Ross' hours are tabulated, and it was determined he averaged 31 hours a week for the first 12 months. He is offered coverage, beginning April 1st, 2022 (following the fractional month rule) and he moves from being a variable hour employee to a full-time employee. In October, at the end of the standard measurement period, Ross' hours are calculated again, as he is now an ongoing employee. This time he averages 29 hours a week. Ross is in his initial stability period (April 1st 2022, to March 31st 2023), so although he is not offered coverage during open enrollment he is able to complete his one year of earned coverage. On April 1st, 2023, Ross is offered COBRA, and his next opportunity to potentially enroll in coverage will be at the end of the next measurement period in October of 2023, assuming he averages 30 hours a week or more. Going forward Ross' hours will be reviewed at the end of every standard measurement period.

## Changes During The Stability Period

The lookback measurement method is designed to dramatically reduce the number of employees changing their classification during the benefits year – it is intended to provide stability to both the employee and the employer. Unless the employee has a bona fide change in employment status (changes to **a new part–time position**), or the employee is a newly hired variable–hours or seasonal employee who transfers to a full–time position, the employee's status as full–time (30 hours per week) or not full–time (fewer than 30 hours per week) during the measurement period determines the employee's status during the subsequent stability period.

For there to be a bona fide change in employment status for an employee who is considered full–time who then transfers into a part–time position, the following strict requirements must be met:

- The employee must have been offered minimum value coverage while full–time from at least the first day of the month following the employee's initial three full calendar months of employment through the month that the change in status occurs (regardless of how long ago the employee's initial three full of calendar months of employment was),
- The new position must be classified as part–time; if the employee simply reduces hours but stays in the existing job, the employee must remain classified as full–time for the rest of the stability period, regardless of whether the employee requested or initiated the reduction in hours.
- This rule only applies if for three months following the change to part–time status the employee averages less than 30 hours a week. The employer applies the monthly measurement period to this employee through the end of the first full measurement period and administrative period that would have applied had the employee remained under the applicable look–back measurement period.

If these requirements are met and documented, the employer may treat the employee as other than full–time, and move the employee to the monthly measurement period, as of the first day of the fourth month after the employee transfers to the part–time position.

If a new variable–hours employee moves into a full–time position during the initial measurement period, the employee must be offered coverage as of the first day of the fourth month after he/she moved to full–time status (or at the start of the next standard stability period, if that would cause him/her to be considered a full–time employee sooner).

## Conclusion

Employers that are considered ALEs must be familiar with the two tracking methods, and ensure they are properly offering benefits in accordance with the eligibility policies under their plans. Furthermore, employers must understand these methods in order to properly review IRS reporting forms before they are filed with the IRS and provided to employees. Employers that do not understand these methods or how they work in practical settings are at risk for missing offers of coverage or filing inaccurate reporting.